Supreme Court, U.S.
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No. 02-1151

IN THE

Supreme Court of the United States

INTERSTATE POWER COMPANY,

Petitioner,

v.

DANIEL MARTINS and COLEEN MARTINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to grant Interstate's petition when Interstate has utterly failed to preserve any federal questions in the state courts, when the state courts have failed to pass on any federal questions, and when Interstate's statement of the case to this Court is devoid of even an attempt to show preservation of federal issues?

2. Does this Court have jurisdiction to review the Iowa Supreme Court's interpretation of Iowa nuisance law?

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STATEMENT OF THE CASE

Daniel and Colleen Martins ("Martins") operated a dairy farm on the edge of Monona, Iowa. Interstate Power Company ("Interstate") is the local electric utility and operates a substation just beyond the farm; the farm is located between the city and the substation, and all are located well within the boundaries of the State of Iowa. The Martins' cows exhibited bizarre behavior for years, which was ultimately proven to result from Interstate's return current in the earth, concentrating in the vicinity of the substation. Interstate took some remedial measures with some limited success, but the problems ultimately returned and Martins moved their damaged herd to another farm. (Petitioners' App. 2-3)

Martins filed suit in November 1996, under Iowa common law theories of strict liability, negligence, nuisance and trespass. (Iowa Ct. Appeals App. at 13) Interstate answered, raising only Iowa common law defenses. (Iowa Ct. Appeals App. at 16) In February 2000, Martins voluntarily dismissed all claims except nuisance. No defenses based upon federal law were ever raised by Interstate until after the Iowa Supreme Court decided this case in Martins' favor; Interstate then attempted for the first time to raise federal issues in its Petition for Rehearing in the Supreme Court. (Petitioner's App. 44-57) The Iowa Supreme Court denied that petition without further comment. (Petitioner's App. 43)

The case was tried to a jury during March and April 2000. The jury returned a verdict on the nuisance claim in Martins' favor, and assessed damages at $700,000. The trial court entered judgment on the verdict. Both the Iowa Court of Appeals and Iowa Supreme Court upheld the judgment. (Petitioner's App. 1-19)

Interstate's Statement of the Case misstates a number of aspects of the record in this case, including:

(1) At page 5 of its Petition, Interstate alleges that "stray voltage" is inherent in the delivery of electric service. The testimony of William English, P.E., Martins' electrical distribution engineering witness, was to the contrary. (Petitioner's App. 115)

(2) At page 6 of its Petition, Interstate alleges that it would have to reject state code to prevent the "nuisance" complained of, citing Petitioner's Appendix at 114-115. There is no such testimony on those pages or elsewhere in this record. Interstate seems to be arguing that it must use the multiple-grounded wye system to comply with code; however, the National Electrical Safety Code (adopted as law in Iowa by Iowa Administrative Code 199.25.2(1)) expressly allows other types of systems that do not cause return current to flow in the ground, particularly at sec. 96B. Some of the alternative, code-compliant systems such as the delta system were discussed in expert testimony and in fact this system was noted in the cited portion of Petitioner's Appendix, pp. 114-115.

(3) Again at page 6 of its Petition, Interstate asserts that its lines were ". . . in complete compliance with Code requirements . . . ," citing Petitioner's Appendix at 114-115. There is absolutely no testimony or evidence contained in that record citation to support the conclusion stated at page 6. Indeed, Mr. English testified that earth currents from Interstate's distribution system unreasonably interfered with Martins' ability to operate their dairy farm. (Iowa Ct. Appeals App. at 528) Furthermore, the Iowa Supreme Court has repeatedly held that negligence is not an essential element

of a nuisance claim. That history is discussed in detail in that court's decision in this case (Petitioner's App. 10-17). As such, compliance or noncompliance with electrical code was not a material issue of fact in this case and was not decided by court or jury. As held by the Iowa Supreme Court in its decision (Petitioner's App. 14):

> The key for such a stand-alone claim of nuisance is that the degree of danger likely to result in damage must be *inherent* in the thing itself. *Guzman*, 489 N.W.2d at 11. Excessive stray voltage from an electric utility resulting in damage to a dairy herd meets that test.

Under Iowa common law, Interstate has an obligation to use its property in such a manner that it ". . . will not unreasonably interfere with or disturb their neighbor's reasonable use and enjoyment of the neighbor's property." *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996), cited in this matter by the Iowa Supreme Court (Petitioner's App. 5-6). Thus, compliance or noncompliance with electric codes is not determinative. The issue is whether Interstate unreasonably interfered with Martins' use and enjoyment of their farm. The jury and the Iowa Courts answered with a resounding "yes" on that issue. However, because the Iowa law of nuisance focuses on the unreasonableness of the effect of the defendant's conduct, and not on the reasonableness or unreasonableness of the conduct itself, the "code compliance" asserted by Interstate was not adjudicated one way or another, contrary to Interstate's assertions in its Petition. Lastly, even if Interstate's code compliance were an issue, Iowa's electric code (Iowa Administrative Code 199.25.2) makes clear that it sets:

> The standard *minimum* requirements for the installation and maintenance of electric substations,

> generating stations, and overhead and underground electric supply or communications lines . . . [Emphasis supplied.]

Interstate fails to assert how alleged compliance with such *minimum* requirements under Iowa law in some way immunizes it from liability as a matter of federal law from Iowa common law nuisance claims, which are not grounded on negligence in the first place.

(4) Interstate references a 1931 easement in its Petition at pp. 7-8. It does not tell this Honorable Court that the easement was never pleaded as a defense (Iowa Ct. Appeals App. at 16), or that the Iowa trial court found that the easement, even if pleaded, was ". . . insufficient to raise a fact issue regarding whether the conduct complained of was authorized by this easement." (Iowa Ct. Appeals App. at 571) That ruling, based on Iowa contract law, was upheld upon appeal. Interstate never raised any federal issue regarding the easement until its Petition for Rehearing in the Iowa Supreme Court (Petitioner's App. 44-57), which was denied (Petitioner's App. 43). Interstate now persists in attempting to manufacture a federal issue out of a state law pleading and contract holding, simply because Interstate lost in the Iowa courts.

(5) Interstate repeatedly alleges it was held "strictly liable" for use of a multiple-grounded wye distribution system. (Petition at 8-9) Strict liability for use of a particular system was *not* the theory propounded to the jury nor was it the subject of the jury's findings. As pointed out above, Interstate was found liable for nuisance, i.e. an unreasonable interference with Martins' use and enjoyment of their farm property. It is this unreasonable interference which is the gravamen of the nuisance holding, not a strict liability theory related to the use of a particular type of electrical distribution system.

REASONS FOR DENYING THE PETITION

A. THIS COURT IS WITHOUT JURISDICTION TO GRANT PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT SINCE PETITIONER FAILED TO PROPERLY RAISE AND PRESERVE ANY U.S. CONSTITUTIONAL OR FEDERAL ISSUES IN THE LOWER COURTS.

The well-established precedent of this Court establishes that any constitutional or federal issues must be properly preserved in the lower courts or be forever waived.

In *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981), this court decided a case having the same fundamental flaws which are present with Petitioner's request for a Writ. The *Webb* case was a family law decision arising out of the Supreme Court of Georgia. In *Webb*, the Court noted that, "This Court has frequently stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Id.* at 495, citing *Street v. New York*, 394 U.S. 576, 582 (1969).

As in *Webb*, since *Martins* comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257 which requires Petitioner to have "specially set up or claimed under the constitution . . . of . . . the United States." This Court has repeatedly held that "Statutes authorizing appeals are to be strictly construed." *Perry Educational Association v. Perry Local Educators Association*, 103 S. Ct. 948, 953 (1983).

Petitioner, Interstate Power Company, now seeks to have this Court ignore United States Supreme Court Rule 14(g)(i) which requires the Petitioner to set forth in Statement of the Case as follows:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears . . .

Any examination of this record would show that Petitioner, Interstate Power Company, failed to preserve or raise a claim under Federal law or the Federal Constitution in the Iowa courts.

Nowhere in the Iowa Supreme Court's decision is any federal question mentioned, let alone expressly passed upon, nor is any federal issue mentioned by the dissenting opinion. This Court has made clear on numerous occasions that "the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb* at 496-497, citing *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897).

Petitioner cannot credibly show either that this Court has jurisdiction or that the record as a whole shows "either expressly or by clear implication that the federal claim was adequately presented in the state system." *Id.* at 496.

The record is clear that it was only when all hope had been lost by Petitioner that the Iowa courts would interpret Iowa law in Petitioner's favor that any federal issue was sought to be brought before the Iowa Supreme Court. Under Iowa law, it is clear that any issue, whether on state or federal grounds, must be raised in the trial court to be preserved for appeal in the Iowa appellate courts. This did not occur with any federal or Constitutional issue. See *In re Hassel*, 600 N.W.2d 335 (Iowa App. 1999). "Issues must ordinarily be presented to and passed upon by the trial court before they can be raised and decided on appeal." *Id.* at 337. (Citing *City of Fort Dodge v. Civil Service Commission*, 562 N.W.2d 438, 440 (Iowa App. 1997); *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa App. 1994)).

Iowa law makes clear that even issues with Constitutional repercussions must be raised in the trial court before they can even be considered on appeal. "Even constitutional issues need to be presented in the trial court before they are considered on appeal." *In re Hassel* at 337.

The record in this case is utterly devoid of any mention of a federal or Constitutional issue in the Iowa District Court or Interstate Power Company's appeal to the Iowa Court of Appeals. Neither United States Supreme Court Rule 14(g)(i) nor Iowa State Court rules requiring that all issues be raised in the trial court before they can be subject to an appeal provide this Court with jurisdiction to hear Petitioner's request for a Writ of Certiorari, and Petitioner has failed in both respects.

Under Supreme Court Rule 14(g)(i), Petitioner has utterly failed the requirement to include in its Statement of the Case "specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; . . ."

Nowhere in its Petition does Petitioner specify any of the information required so that this Court can be satisfied that it actually has jurisdiction in this case. The reason why no mention is made pursuant to the requirements of Rule 14(g)(i) is that these events simply did not take place. At no point was a federal question raised in the trial court or in the intermediate appellate court or in the Iowa Supreme Court until after the Iowa Supreme Court had issued its decision. Ultimately, it is this most basic jurisdictional issue which must prevent the United States Supreme Court from reaching the merits of this case.

B. THIS COURT IS WITHOUT JURISDICTION TO GRANT PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI TO THE IOWA SUPREME COURT SINCE THE IOWA SUPREME COURT IS THE ULTIMATE AUTHORITY OF IOWA NUISANCE LAW.

Primarily, this case has been about nuisance and its interpretation in the courts of the State of Iowa. Over Interstate's protests, the Martins proceeded in March and April of 2000 to try this case solely on a nuisance claim. The jury was instructed in Iowa nuisance law. The special verdict rendered by the jury dealt with the issue of nuisance. Two levels of Iowa Appellate Courts examined the facts of the case and reviewed Iowa nuisance law. They each agreed with the verdict of the jury and the rulings of the trial court.

As in the *Webb* case, *supra*, the Supreme Court of Iowa understood *Martins* to concern primarily Iowa nuisance law. It noted from the first paragraph of the opinion that:

> On further review, we consider one issue: Whether the district court erred in submitting a "pure nuisance" claim without an accompanying negligence claim in a stray voltage case against an electric utility. Finding no error, we affirm the court of appeals decision and the judgment of the district court. (Petitioner's App. 2)

Later in the opinion the court reiterated its position:

> Interstate raised numerous issues on appeal. We address only one: Whether the district court erred by applying a "pure nuisance" claim against the utility without an accompanying negligence claim. We conclude the court of appeals adequately addressed and correctly decided the issues we do not address. (Petitioner's App. 5)

This court has often dealt with attempts at overturning state court decisions by resorting to the U.S. Supreme Court. ". . . [I]t is a well-established principle of federalism, that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). ". . . [I]t is not for us, however, to decide this question of Maryland law, or to reach a conclusion as to how the Maryland Court of Appeals would decide it. Such a course would be inconsistent with our tradition of deference to state courts on questions of state law." *Bell v. Maryland*, 378 U.S. 226, 237, 84 S.Ct.

1814 (1967). This can also be seen in *Eisenstadt v. Baird*, 405 U.S. 438, 442, 92 S.Ct. 1029 (1972), ". . . construction of state law is, of course, binding on us." *See also Groppi v. Wisconsin*, 400 U.S. 505, 507, 91 S.Ct. 490, 491 (1971).

This Court can rest assured in the knowledge that the Iowa Supreme Court has fully examined the application of Iowa nuisance law, which is the only issue this case has ever been about.

CONCLUSION

The Petitioner, Interstate, fails to raise any properly preserved Constitutional or federal issues warranting review by this Court. The issues before the lower courts have always concerned interpretation of Iowa law concerning nuisance. The appellate courts of the State of Iowa were not presented with an opportunity to rule on the issues for which the Petitioner now seeks this Court's review. Petitioner has not made a showing in this Court that the Iowa Supreme Court failed to address federal issues properly presented to it. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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